Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Amendment to the Commission's Rules	)	WT Docket No. 95-157
Regarding a Plan for Sharing	)	RM-8643
the Costs of Microwave Relocation	)	

REPLY COMMENTS OF AT&T WIRELESS SERVICES, INC.

AT&T Wireless Services, Inc. ("AT&T") hereby submits its reply comments in the above-captioned proceeding.[1/] AT&T supports the establishment of a cost-sharing mechanism, so long as contractual cost-sharing arrangements can co-exist with it, and agrees with the need for microwave relocation guidelines that can bring the relocation process to a close as efficiently and quickly as possible.

INTRODUCTION AND SUMMARY

The vast majority of the commenters in this proceeding concur that the Commission's proposal to implement a cost-sharing mechanism for microwave relocation is in the public interest.[2/] As the commenters suggest, cost-sharing will result in reduced economic burdens for all parties involved, facilitate negotiations, and promote sound principles of equity.[3/]

[1/] Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, Notice of Proposed Rule Making, WT Docket No. 95-157, RM-8643, FCC No. 95-426 (released Oct. 13, 1995) ("Notice").

[2/] See Comments of Central Iowa Power Cooperative at 1; Comments of Go Communications Corporation at 1-2; Comments of Omnipoint Communications, Inc. at 1-3; Comments of the American Petroleum Institute at 5; Comments of the Cellular Telecommunications Industry Association at 5; Comments of the Southern California Gas Company at 3-4.

[3/] See Comments of Association of American Railroads at 15.

Cost sharing will also promote swift relocation and eliminate the ability of certain PCS providers to obtain a "free-ride" from other PCS providers that have already entered the PCS marketplace.[4/]

AT&T also supports a Commission-mandated cost-sharing mechanism, but only if private agreements such as the one AT&T entered with Wireless Co. L.P., PhillieCo, PCS PrimeCo, L.P., and GTE Macro Communications Service Corporation ("Cost-Sharing Agreement")[5/] are permitted to coexist with the Commission's cost-sharing plan.[6/] The broad base of support for the coexistence of private cost-sharing agreements with a Commission-mandated plan includes the bulk of A- and B-block PCS licensees, as well as both CTIA and PCIA.[7/]

Although most microwave incumbents support cost sharing, some incumbents hesitate to endorse the Commission's proposal because they fear that a cap on reimbursable relocation expenses might limit the amount that PCS providers will be willing to spend to relocate

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[4/] See, e.g., Comments of BellSouth Corporation at 1-2; Comments of San Diego, California at 3-4; Comments of U.S. Airwaves Inc. at 1.

[5/] See Letter of November 7, 1995 from Cathleen A. Massey, AT&T Wireless Services, Inc. Vice President - External Affairs, to William F. Caton, Acting Secretary.

[6/] Comments of AT&T Wireless Services, Inc. at 2.

[7/] The Cost-Sharing Agreement alone includes 77 percent of all A- and B-block PCS licensees. Id.; see also Comments of the Personal Communications Industry Association at 37; Comments of PCS Primeco, L.P. at 14; Comments of Pacific Bell Mobile Services at 6; Comments of the Sprint Telecommunications Venture at 31; Comments of the City of San Diego, California at 5; Comments of the Cellular Telecommunications Industry Association at 7; Comments of the Industrial Telecommunications Association, Inc. at 7.

incumbent microwave licensees.[8/] Some microwave incumbents also question certain aspects of the Commission's proposed relocation policies because they believe that these guidelines might preclude other benefits that they will receive from PCS providers.[9/]

AT&T believes that the Commission's cost-sharing proposal and relocation guidelines should not be used to unjustly enrich microwave incumbents or provide them with extraordinary benefits beyond the "comparable facilities" currently required by the Commission's rules. AT&T supports the Commission's proposed reimbursement cap on cost-sharing obligations because it will result in an equitable allocation of relocation costs among PCS licensees who are benefitted while preserving the obligation of PCS operators to provide incumbent microwave users with "comparable facilities" regardless of their cost.

Likewise, PCS providers should not be required to fund upgrades to digital facilities as part of their obligation to provide comparable facilities. Incumbents that wish to upgrade their facilities during the relocation process should be required to fund the upgrade. In addition, because the Commission's rules require PCS providers to replace relocated facilities with comparable systems and nothing more, the rejection of an offer of comparable facilities should per se be considered an act of bad faith that triggers the commencement of the mandatory negotiation period.

Microwave incumbents should also not be permitted to extend the relocation process unnecessarily or extract unreasonable fees from PCS providers. For these reasons, the

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[8/] See, e.g., Comments of the American Gas Association at 4; Comments of Valero Transmission, L.P. at 3; Comments of the Association of American Railroads at 11.

[9/] See, e.g., Comments of the American Petroleum Institute at 17; Comments of the American Public Power Association at 3.

Commission should adopt its proposals to limit the cost-sharing obligations of PCS providers and primary status for microwave incumbents to 10 years and not compel PCS providers to reimburse microwave incumbents for the legal, travel, consulting, and other expenses related to the relocation process.

I. The Commission's Cost-Sharing Proposal, Subject To Certain Conditions, Would Serve The Public Interest

In its initial comments in this proceeding, AT&T supported the adoption of a Commission-mandated cost-sharing plan subject to a few conditions. AT&T stated that the Commission's cost-sharing mechanism was only acceptable if it permitted the coexistence of private cost-sharing agreements such as the Cost-Sharing Agreement.[10/] AT&T also urged the Commission to utilize the "proximity threshold" instead of the TIA Bulletin 10-F interference standard to determine the liability of PCS providers for relocation costs,[11/] and to establish that depreciation for purposes of cost sharing would begin when a system becomes operational instead of the Commission's proposal to use the date of registration with the clearinghouse.[12/]

Other commenters agree with AT&T that private cost-sharing agreements will likely result in efficient arrangements, facilitating the swift clearing of the 2 GHz band.[13/] The

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[10/] Comments of AT&T Wireless Services, Inc. at 6.

[11/] Id. at 7.

[12/] Id. at 9.

[13/] See Comments of the Personal Communications Industry Association at 37; Comments of PCS Primeco, L.P. at 14; Comments of Pacific Bell Mobile Services at 6; Comments of the Sprint Telecommunications Venture at 31; Comments of the City of San Diego, California at 5; Comments of the Cellular Telecommunications Industry Association at 7; Comments of the Industrial Telecommunications Association, Inc. at 7.

parties to the Cost-Sharing Agreement support the use of the proximity threshold,[14/] which, as AT&T demonstrated in its comments, would reduce the complexity and uncertainty of the Commission's cost-sharing plan.[15/]

Although a number of commenters have positions different from AT&T's on the issue of the commencement of depreciation for purposes of cost-sharing,[16/] these commenters fail to take into account the inequities that would result from the Commission's proposal to commence depreciation based on a date established by the clearinghouse. As AT&T demonstrated in its comments, the Commission's proposal would penalize PCS providers for early registration with the clearinghouse by reducing their reimbursement rights.[17/] The Commission's proposal would also disadvantage PCS relocators by artificially and unfairly reducing the share of costs that could be apportioned to subsequent PCS licensees.[18/]

Although microwave incumbents generally support the Commission's cost-sharing proposal, they are apparently concerned that the Commission's cost-sharing proposal could

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[14/] See Comments of GTE at 5-6; Comments of PCS PrimeCo, L.P. at 12-13; Comments of the Sprint Telecommunications Venture at 25-26.

[15/] Comments of AT&T Wireless Services, Inc. at 7.

[16/] See, e.g., Comments of Southwestern Bell Mobile Systems, Inc. at 8 (depreciation should begin with registration with the clearinghouse); Comments of U.S. Airwaves, Inc. at 3 (depreciation should begin on a uniform date); Comments of the Sprint Telecommunications Venture at 28 (ties depreciation to the date on which reimbursement rights obtained from the clearinghouse).

[17/] Comments of AT&T Wireless Services, Inc. at 10.

[18/] Id.

limit the compensation that incumbent microwave users receive from PCS providers.[19/] These incumbents fear that a reimbursement cap would artificially limit the relocation expenditures of PCS providers and therefore chill negotiations.[20/] The Commission, however, has already determined that the reimbursement cap will not affect the amount that incumbents are entitled to receive from PCS providers.[21/]

A. The Commission's Cost-Sharing Proposal Would Not Unduly Limit Relocation Payments to Incumbent Microwave Users

AT&T supports the Commission's proposal to adopt a $250,000 per link reimbursement cap, with an added $150,000 for new towers.[22/] In addition to the fact that these figures represent reasonable approximations of the costs of relocation,[23/]

[19/] See, e.g., Comments of the American Gas Association at 4; Comments of Valero Transmission, L.P. at 3; Comments of the Association of Public-Safety Communications Officials-International at 13; Comments of the Association of American Railroads at 11.

[20/] Comments of the Association of American Railroads at 10; Comments of the National Rural Electric Cooperative Association at 5.

[21/] Notice ¶ 42.

[22/] See id. at ¶ 43. AT&T also sought clarification in its comments in this proceeding that the $150,000 tower cap would apply to tower modifications as well as new towers. Comments of AT&T Wireless Services, Inc. at 4 n.8; see also Comments of BellSouth Corporation at 18.

[23/] Maine Microwave Associates, for example, argues that $1 million per link in relocation expenses is reasonable. Comments of Maine Microwave Associates at 2. This might be true for the replacement of an entire system, but not typically for a single link. See Notice ¶ 43, citing, FCC Office of Engineering and Technology, Creating New Technology Bands for Emerging Telecommunications Technology, OET/TS 92-1 at 18 (a 1992 study by the Commission's Office of Engineering and Technology finding that relocation costs should average between $132,000 and $215,000 per link).

under the Commission's current rules, microwave incumbents are guaranteed to receive comparable facilities, regardless of their cost.[24/] The reimbursement cap does not serve as a limit on the expenses that microwave incumbents can negotiate to receive from PCS providers. Indeed, the Commission does not propose to limit the amount that PCS providers may expend to move a link at all, only to limit the amount that will be reimbursable from other PCS providers.[25/] Although the reimbursement cap will not include premium payments, the Commission does not propose to prohibit them.[26/]

Far from reducing the amount incumbents will receive from PCS licensees, mandatory cost sharing, even if subject to a reimbursement cap, is more likely to increase the amount an incumbent will receive because the PCS licensee will be assured of recovering a portion of the relocation expenses in appropriate cases. The PCS licensee will therefore be in a position to agree to a higher total price because it will not need to bear the entire cost itself. The incumbents have offered no principled basis for rejecting the proposed reimbursement cap.[27/]

[24/] See 47 C.F.R. § 94.59(c)(3); Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589, 6603-04 (1993) ("Third Report and Order").

[25/] Notice ¶ 42.

[26/] Id.

[27/] See also Comments of BellSouth Corporation at 7-8; Comments of Central Iowa Power Cooperative at 1; Comments of UTAM, Inc. at 11; Comments of Omnipoint Communications, Inc. at 6.

II. Microwave Incumbents Should Not Be Permitted To Demand System Upgrades, Extend Relocation Obligations Unnecessarily, Or Impose Undue Costs on PCS Providers

As AT&T demonstrated in its comments in this proceeding, the Commission should use this rulemaking as an opportunity to refine its microwave relocation rules in order to ensure that the process proceeds efficiently and expeditiously.[28/] Instead of advocating rules that would promote a smooth relocation process, several incumbent microwave users attempt to contort the Commission's proposed relocation guidelines to maximize the benefits of microwave relocation for incumbent microwave users. The Commission's relocation guidelines should not serve as a windfall for incumbent microwave users to the detriment of a fair and efficient relocation process.

A. Upgrades To Digital Facilities Should Not Be Required In Order To Provide Incumbent Microwave Licensees With Comparable Facilities

Microwave incumbents argue that in order to comply with the "comparable facilities" requirement,[29/] PCS providers should be required to replace analog microwave facilities with digital facilities upon relocation. Some incumbents assert that the Commission should mandate digital replacement facilities because digital equipment is the standard in the

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[28/] Comments of AT&T Wireless Services, Inc. at 11. AT&T requested that the Commission permit incumbent microwave users to waive certain Commission protections by contract; clarify its procedures for relocating secondary microwave licensees; require public safety entities to certify their special status, and reduce the voluntary negotiation period and require incumbents to negotiate in good faith at all times. Id. at 12-14.

[29/] 47 C.F.R. § 94.59(c)(3).

industry[30/] and others believe that the use of outmoded analog equipment would compromise public safety.[31/]

The Commission's rules require PCS operators to provide microwave incumbents with comparable facilities, which the Commission has determined to mean "equal to or superior to existing facilities."[32/] Due to the superior capacity and capabilities of digital facilities, the replacement of existing analog facilities with digital equipment would clearly result in an upgrade to superior facilities.[33/] Compelling PCS providers to replace analog equipment with digital facilities would be inconsistent with the option given to PCS providers to furnish microwave incumbents with superior or equal equipment.

Public safety entities claim that they should be entitled to digital facilities because analog replacement facilities would threaten the public safety.[34/] If this is the case, it is not clear why public safety entities have waited until the microwave relocation process to seek digital facilities. Public safety incumbents have provided no evidence that their currently operating analog systems pose a risk to public safety, or why the microwave relocation process is a special risk to public safety. PCS providers must provide all relocated microwave incumbents with comparable facilities and nothing more, and the incumbent

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[30/] Comments of the American Petroleum Institute at 17; Comments of the Association of Public-Safety Communications Officials-International, Inc. at 6.

[31/] Comments of the Association of American Railroads at 6.

[32/] Third Report and Order, 8 FCC Rcd at 6603.

[33/] See Comments of Alexander Utility Engineering Inc. at 2.

[34/] Comments of the Association of American Railroads at 6.

public safety licensee's responsibility to determine how to discharge its obligations to protect public safety remains unchanged.

Microwave incumbents with analog equipment should be permitted to upgrade their facilities to digital equipment if they choose. In that event, however, PCS providers should be required to bear only the portion of relocation expenses that would have been related to acquiring analog replacement facilities. Microwave incumbents should be required to fund the difference between comparable facilities and the digital facilities, with PCS providers bearing only the expenses associated with procuring equal analog facilities.[35/]

B. Rejection Of An Offer Of Comparable Facilities Should Constitute "Bad Faith" And Result In Commencement of the Mandatory Negotiation Period

Some microwave incumbents suggest that because the Commission does not propose to require PCS providers to fund digital replacement facilities, they will be forced to accept inferior facilities or be found guilty of "bad faith."[36/] Nothing in the Commission's existing or proposed rules would require an incumbent to accept "inferior" facilities. To the contrary, the Commission requires PCS licensees to provide microwave incumbents with comparable facilities.[37/] Any rejection of an offer of comparable facilities should by definition be considered bad faith because PCS providers are not required by the

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[35/] This does not preclude a PCS licensee from agreeing to upgrade an incumbent to a digital system as an incentive for reaching an agreement with an incumbent during the voluntary period.

[36/] See, e.g., Comments of the Association of Public-Safety Communications Officials-International, Inc. at 6; Comments of the Los Angeles County Sheriff's Department and the County of Los Angeles, Internal Services Department at 3; Comments of the American Public Power Association at 3.

[37/] See 47 C.F.R. § 94.59(c)(3).

Commission's rules to offer more. If bad faith on the part of microwave incumbents occurs during the voluntary negotiation period, it should result in the commencement of the mandatory negotiation period.[38/]

Although the microwave incumbents fear that the determination of what facilities are comparable will be subject to much dispute, the Commission has set forth a series of technical specifications that will provide negotiators with objective standards for determining whether facilities are comparable.[39/] In the event of a dispute, microwave incumbents may provide evidence that facilities were not comparable. Without such evidence, however, the Commission should find bad faith on the part of incumbents.

C. The Commission Has Proposed An Appropriate Sunset Period

Many incumbents believe that the 10-year sunset that the Commission proposes on cost-sharing obligations and primary status for incumbent microwave licensees is too short.[40/] Of particular concern to certain incumbents are rural microwave users that might

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[38/] Comments of AT&T Wireless Services, Inc. at 15. See also Comments of Go Communications Corporation at 7; Comments of the Personal Communications Industry Association at 11. Repeated failures to negotiate in good faith should result in license revocation. Id. at 15 n.40. For example, a refusal to provide information necessary to determine the comparability of systems would evidence a failure to negotiate in good faith.

[39/] These include communications throughput, system reliability, and operating cost. Notice ¶ 73. AT&T disagrees with the commenters that suggest that equipment reliability should be a measure of whether facilities are comparable. For example, The Southern Company proposes that replacement systems meet a standard of 99.9999 percent reliability. Comments of The Southern Company at 10. This is unreasonable unless the existing facilities can be shown to operate at that level, and even then this is only one of several factors that should be considered.

[40/] See, e.g., Comments of the American Public Power Association at 3; Comments of the Association of American Railroads at 8; Comments of the American Petroleum Institute at 19.

not need to be relocated because of PCS build-out until after the expiration of the 10-year sunset.[41/]

AT&T believes that 10 years is sufficient time to expect all microwave licensees to relocate,[42/] providing PCS operators with deserved closure on this aspect of entry into the PCS marketplace. The 10-year time period will also provide microwave incumbents with the incentive to negotiate with PCS providers. Because PCS providers should have no responsibility to relocate secondary microwave licensees,[43/] incumbents will be forced to negotiate with PCS providers or otherwise lose all rights to obtain payments for comparable facilities after the 10-year period.

Although 10 years should be the limit for cost-sharing obligations and primary status for incumbent microwave licensees, there may be instances where 10 years is insufficient. In the very isolated circumstances where relocation within 10 years would threaten the public safety or impose extreme hardship on the microwave incumbents such as rural entities, the Commission could entertain limited waivers of the 10-year period.

[41/] Comments of the National Rural Electric Cooperative Association at 7.

[42/] As the GTE Service Corporation points out, the fixed ten-year period stated in the Cost-Sharing Agreement would end slightly later than the Commission's proposed April 4, 2005 sunset. Comments of GTE Service Corporation at 16. Consistent with its tentative conclusion to allow private cost-sharing agreements to go forward, Notice ¶ 29, the Commission should allow the sunset date set forth in the Cost-Sharing Agreement to govern the cost-sharing obligations between the parties to the Agreement.

[43/] AT&T has sought clarification that PCS providers do not need to initiate any action or have an obligation to relocate secondary microwave licensees. Comments of AT&T Wireless Services, Inc. at 13; see also Comments of BellSouth Corporation at 9.

D. PCS Providers Should Not Be Required To Shoulder Incumbents' Engineering, Legal, Travel, Or Consultants Costs

Microwave incumbents assert that relocation expenses associated with engineering, legal, consultant, and travel fees should be considered compensable costs.[44/] In the Notice, the Commission recognizes only engineering costs as compensable for the purposes of cost sharing.[45/]

Apart from engineering fees, which if incurred are necessitated by the relocation process, PCS providers should not be required to reimburse incumbents for other costs such as legal and consultants' fees that are not part of the costs associated with actual relocation.[46/] Whereas engineering expenses will most likely be necessary to facilitate the relocation process, microwave incumbents negotiating in good faith should not need to expend large sums on other such services. PCS providers should therefore not be expected to reimburse incumbent licensees for these expenses.

CONCLUSION

For the foregoing reasons, the Commission should permit contractual cost-sharing agreements to coexist with the Commission's own cost-sharing plan; adopt a "proximity threshold" in lieu of TIA Bulletin 10-F to determine which links would be subject to cost-sharing; adopt its reimbursement cap; clarify that PCS providers need not replace analog facilities with digital equipment; require microwave incumbents to accept an offer of

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[44/] See, e.g., Comments of the Association of Public-Safety Communications Officials-International at 8; Comments of the Association of American Railroads at 7.

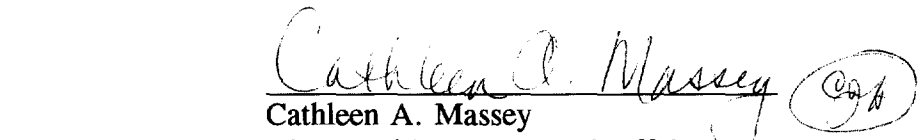
[45/] Notice ¶ 37.

[46/] Of course, if the Commission determines that these are compensable, they should be subject to cost sharing up to the reimbursement cap.

comparable facilities or be deemed to be negotiating in bad faith; approve a 10-year sunset period for cost-sharing and primary status for microwave incumbents; and prohibit incumbents from receiving reimbursement for their legal, travel, or consulting expenses.

Respectfully submitted,

AT&T WIRELESS SERVICES, INC.



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CERTIFICATE OF SERVICE

I, Tanya Butler, do hereby certify that on this 11th day of January, 1996, I caused a copy of the foregoing Reply Comments of AT&T Wireless Services, Inc. to be sent by first class mail, postage prepaid, or to be delivered by messenger (*) to the following:

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